Supreme Court, U.S.
FILED

(1) 96 955 DEC 3 1996

NO. _____

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

MARWAN AFANEH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

YELSKY & LONARDO CO., L.P.A.
BY: LEONARD W. YELSKY, ESQ.
Reg. No. 0034277
BY: ANGELO F. LONARDO, ESQ.
Reg. No. 0032274
1050 Leader Building
Cleveland, Ohio 44114
(216) 781-2550

Counsel for Petitioner

45 pp

QUESTION PRESENTED FOR REVIEW

WHETHER A FELON CAN BE JUSTIFIABLY CONVICTED FOR CONSTRUCTIVE POSSESSION OF A FIREARM, IN VIOLATION OF 18 U.S.C. §922(g)(1), FOR CONDUCT OCCURRING DURING THE COURSE, AND WITHIN THE SCOPE OF, HIS LEGITIMATE EMPLOYMENT AS A MANAGER OF A STORE, WHEN THE ACCUSED LACKED THE REQUISITE MENS REA, OR CRIMINAL INTENT, TO ENGAGE IN WRONGDOING OR COMMIT AN UNLAWFUL ACT.

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES 1

OPINIONS BELOW 2

JURISDICTIONAL STATEMENT 2

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

STATEMENT OF THE FACTS 3

1. Petitioner's Place Of Employment 3
2. Underlying State Investigation 5
3. Evidence Presented At Trial 5
4. District Court's Judgment Of Acquittal 7
5. Per Curiam Decision Of The Sixth Circuit Court Of Appeals 8

REASONS FOR GRANTING WRIT 9

I. CERTIORARI SHOULD BE GRANTED SO THIS COURT CAN DECIDE THE IMPORTANT FEDERAL QUESTION OF WHETHER AN ACCUSED CAN BE CONVICTED OF CONSTRUCTIVE POSSESSION OF A FIREARM BY A FELON, IN VIOLATION OF 18 U.S.C. §922(g)(1) ON THE BASIS OF CONDUCT OCCURRING DURING THE COURSE OF HIS LEGITIMATE EMPLOYMENT WHERE THE ACCUSED LACKED THE REQUISITE "MENS REA", OR CRIMINAL INTENT, TO ENGAGE IN WRONGDOING OR COMMIT AN UNLAWFUL ACT. 9

II. THE SIXTH CIRCUIT'S RULING IS IN CONFLICT WITH OTHER CIRCUIT COURTS AS NO OTHER CIRCUIT COURT HAS EVER DISPENSED WITH THE REQUIREMENT OF A CRIMINAL INTENT OR CULPABLE MENS REA TO COMMIT AN UNLAWFUL OFFENSE; AND, THE SIXTH CIRCUIT COURT'S RULING IS CONTRARY TO OHIO LAW.....11

CERTIFICATE OF SERVICE 14

APPENDIX:

July 3, 1996 Per Curiam Decision by the United States Court of Appeals for the Sixth Circuit which reversed the District Court's Order granting Judgment of Acquittal for the Petitioner.....A-1

March 1, 1995 Memorandum Opinion entered by the District Court granting Judgment of Acquittal in favor of Petitioner.....A-5

September 4, 1996 Order denying Petition for Rehearing En Banc filed in the Sixth Circuit Court of Appeals...A-16

September 11, 1996 Motion for Stay of Mandate Pending Application to the Supreme Court for a Writ of Certiorari A-17

State v. Hardy, 60 Ohio App. 2d 325 (Cuy. Cty. 1978).....A-19

TABLE OF AUTHORITIES

CASES: **PAGE(S)**

Scarborough v. United States, 431 U.S. 563, 576, 97 S.Ct. 1963, 52 L.Ed.2d 582 (1977) 9

State v. Hardy, 60 Ohio App. 2d 325 (Cuy. Cty. 1978) 11,13

United States v. Afaneh, 28 F.3d 1214 (6th Cir.) (unpublished), cert. denied, 115 S.Ct. 576 (1994) 3,5,9

United States v. Apfelbaum, 445 U.S. 115, 131, 100 S.Ct. 948, 63 L.Ed.2d 250 (1980) 10

United States v. Beverly, 750 F.2d 34 (6th Cir. 1984) 10

United States v. Blue, 957 F.2d 106 (4th Cir. 1992) 10

United States v. Soto, 779 F.2d 558 (9th Cir. 1986) 10

STATUTES:

18 U.S.C. §922(g)(1) 2,3,9,10

18 U.S.C. §924 3,10

18 U.S.C. §924(e) 10

18 U.S.C. §3231 2

18 U.S.C. §3731 2

28 U.S.C. §1254(1) 2

Ohio Rev. Code §2923.13 12

RULES:

Federal Rule of Criminal Procedure 29(c) 3,8

OTHER STATUTES:

Armed Career Criminal Act of 1984 10

Senator Spector, Subcommittee on Crime
September 23, 1982, p. 4-5 (H.R. 6386,
S. 1688) 10

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

MARWAN AFANEH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Petitioner.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATED JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Petitioner, **MARWAN AFANEH**, respectfully prays that a writ of certiorari issue to review the July 3, 1996 judgment of the United States Court of Appeals for the Sixth Circuit, which judgment became final with the Order issued by the Court on September 4, 1996, denying a petition for rehearing en banc.

OPINIONS BELOW

The March 1, 1995 Memorandum Opinion of the United States District Court for the Northern District of Ohio, Eastern Division, entering a judgment of acquittal in favor of the Petitioner is unpublished and contained in Appendix attached hereto, beginning at Appendix page 5 ("A. 5").

The July 3, 1996 per curiam Opinion by the United States Court of Appeals for the Sixth Circuit which reversed the District Court's Order granting Judgment of Acquittal for the Petitioner is unpublished and contained in the Appendix annexed hereto beginning at A. 1.

JURISDICTIONAL STATEMENT

The case arises out of a federal prosecution for the alleged possession of firearms by a felon, in violation of 18 U.S.C. §922(g)(1). Jurisdiction was vested in the United States District Court for the Northern District of Ohio, Eastern Division, pursuant to 18 U.S.C. §3231. Respondent appealed the District Court's March 1, 1995 Order granting judgment of acquittal in favor of Petitioner to the United States Court of Appeals for the Sixth Circuit, pursuant to 18 U.S.C. §3731. The jurisdiction of the United States Supreme Court is sought pursuant to 28 U.S.C. §1254(1) to review the July 3, 1996 decision entered by the Sixth Circuit which reversed the District Court's March 1, 1995 Order (A. 5).

CONSTITUTIONAL PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES, FIFTH AMENDMENT

"No person . . . shall be . . . deprived of life, liberty or property without due process of law . . ."

STATEMENT OF THE CASE

On June 3, 1993, Petitioner, MARWAN AFANEH, was named as a defendant in a two (2) count indictment returned by the

federal grand jury for the Northern District of Ohio, in a case styled United States of America v. Afaneh, Case No. 1:93CR175. The two (2) count indictment alleged that on or about February 8, 1993, Petitioner, a felon, knowingly possessed two (2) .38 caliber fire-arms, in violation of 18 U.S.C. §922(g)(1).

On August 3, 1993, the District Court (Dowd, J) entered a Memorandum Opinion and Order which found that the February 8, 1993 warrantless arrest of Petitioner was unlawful and without probable cause; and, that statements allegedly made by Petitioner immediately following his unlawful arrest were obtained by police in violation of Petitioner's Fourth Amendment protections and inadmissible.

On July 12, 1994, the Sixth Circuit Court of Appeals entered a majority decision, over dissent, reversing the District Court's Order which suppressed statements allegedly made by Petitioner; and, certiorari was denied by the Supreme Court. United States v. Afaneh, 28 F.3d 1214 (6th Cir.) (unpublished), cert. denied, 115 S.Ct. 576 (1994). The matter proceeded to trial on January 17, 1995; and, on January 19, 1995, the jury returned a guilty verdict as to both counts of the indictment.

On March 1, 1995, pursuant to Rule 29(c) of the Federal Rules of Criminal Procedure, the District Court granted Petitioner's Motion for Judgment of Acquittal (A. 5). On July 3, 1996, the Sixth Circuit Court of Appeals entered a per curiam decision reversing the District Court's judgment of acquittal. (A. 1).

On July 15, 1996, a Petition for Rehearing with Suggestion for En Banc Review was filed in the Sixth Circuit Court of Appeals, which was denied by Order dated September 4, 1996. (See: Order contained in Appendix, attached, at A. 16).

On September 11, 1996, Petitioner filed a Motion for Stay of Mandate Pending Appeal to the Supreme Court for a Writ of Certiorari, which was granted by the Sixth Circuit on September 20, 1996. (See: Motion for Stay contained in Appendix, attached, at A. 17).

STATEMENT OF FACTS

1. Petitioner's Place Of Employment:

Petitioner has three (3) prior felony convictions, the most recent occurring over ten (10) years ago on February 9, 1983.

In 1990, Petitioner was placed on parole contingent upon his obtaining legitimate employment for a period of two (2) years. In 1990, Petitioner's sister, Intesar Afaneh, and Awni Shuman, purchased "Dave's Drive-Thru Mini Mart" (hereinafter "Dave's Mini-Mart"), a drive-through beverage/mini market, from David Shears. The store was open 24 hours a day, and Petitioner was employed as the day manager. Petitioner's brother-in-law was employed as the night manager. The store had numerous other employees, including Bilal Rahman, Trina Shobe, Jerome Coleman, Damita Davis and Mohammed Nasser.

The store was located in a dangerous and high crime area in Cleveland's inner-city. One employee, Bilal Rahman, had been robbed and nearly beaten to death after leaving work; and, another individual had been shot in the parking lot of the store. During the recent months, numerous Arab-American grocery store owners and operators had been murdered in the immediate area. The police response time to 9-1-1 calls from the store was very poor, ranging from 30 minutes, to a couple of hours, to not at all.

Two (2) .38 caliber firearms were located in the store for the protection of the store's employees. One (1) of the firearms was located in front of the store under the cash register, and the other firearm was located in a heating duct next to a safe in the office/ storage room adjacent to the drive-through area. Everybody who worked in the store knew where the guns were located, including the Petitioner.

Petitioner and Bilal Rahman, as employees with prior felony records, never touched the firearms. All employees at the store were informed that Petitioner and Bilal Rahman had felony records and could not touch or carry a fireman; and, that if there was trouble at the store, the employees should call 9-1-1. As manager of the store, Petitioner made thousands of dollars in cash deposits to area banks on a daily basis in a dangerous, high-crime neighborhood. Petitioner never carried a firearm when making these cash deposits; and, none of the store employees or any law enforcement officers ever saw Petitioner in the possession of a firearm.

In 1992, Petitioner satisfactorily completed the period of his two (2) year parole and continued to work as the day manager of Dave's Mini-Mart.

2. Underlying State Investigation:

This case arose from an investigation conducted by the Cleveland Police Department into the alleged food stamp trafficking activity. Dave's Mini-Mart was one (1) of 25 stores located in Cleveland's inner-city targeted for investigation. On February 8, 1993, a search was conducted of the 25 targeted stores, including Dave's Mini-Mart, for evidence of alleged food stamp violations, pursuant to a search warrant issued by the Court of Common Pleas for Cuyahoga County, Ohio. Of the 25 stores searched on February 8, 1993, Dave's Mini-Mart was the only store not charged with any alleged food stamp violations.

3. Evidence Presented At Trial:

Respondent presented two (2) witnesses at trial — former Cleveland Police Detective, Thomas Alexander, and Special Agent Roy Cavan (FBI). Their testimony concerned their observations and conversations with Petitioner during the execution of the search warrant at Dave's Mini-Mart on February 8, 1993.

Law enforcement officers entered Dave's Mini-Mart at approximately 3:10 p.m. on February 8, 1993. Petitioner and other store employees were immediately handcuffed and placed under arrest.[1] Petitioner was informed that the police were there pursuant to a court authorized search warrant, to search the store for evidence of alleged food stamp violations. Petitioner was advised of his constitutional rights and given a copy of the search warrant to read. Petitioner read the search warrant which authorized the police to search for evidence of food stamp trafficking; and, also firearms and "other contraband". Petitioner indicated that he understood those rights; and, stated that he was "clean" and "we don't do anything wrong".

Special Agent Cavan (FBI), for the safety of the personnel on the scene, then inquired of Petitioner if he maintained any firearms on the premises, as it appeared Petitioner was the person in charge.

---

[1]The District Court and the Sixth Circuit Court of Appeals both found the arrest of Petitioner to be unlawful and without probable cause. United States v. Afaneh, 28 F.3d 1214 (6th Cir.) (unpublished), cert. denied, 115 S.Ct. 576 (1994).

Petitioner was very cooperative and directed the officers to a firearm located under a cash register in the front of the store; and, to a second firearm in the office of the store located in a heating duct next to a safe. Both weapons were contained in paper bags and located in areas of the store to which all employees had equal access, as the office was also used as a storage room and open to all employees.

Special Agent Cavan questioned Petitioner about the firearms and Petitioner related that he only managed the store and the firearms did not belong to him; that the store was owned by his sister, Intesar Afaneh; and, that the firearms were "possibly" left by the prior owner and they may have given him some money for them, but Petitioner was uncertain how the firearms were obtained. Special Agent Cavan checked with the prior owner of the store, David Shears, and was informed that he did not sell the firearms to Petitioner.

Petitioner was not seen in possession of either firearm on the day of the search. When Petitioner was searched, he had $1,600.00 in cash from the store on his person, in a high crime area, but no weapon. Petitioner also allowed the police to search his car and, again, no weapon was found in his vehicle.

Petitioner and the other store employees were taken to jail for processing and released the next day; and, no charges were ever brought against Petitioner, Dave's Mini-Mart, or any other store employee as a result of the food stamp trafficking investigation. All of the items seized from Dave's Mini-Mart on February 8, 1993, with the exception of the two (2) firearms, were returned to the owners of the store.

After the return of the indictment in the herein cause, on June 3, 1993, Petitioner was arrested in his car leaving Dave's Mini-Mart while en route to the bank. When informed of the charges alleged in the indictment, Petitioner purportedly stated, "I don't care, I can do the time. I can go back to prison". Petitioner and his vehicle were again searched for weapons. Again, Petitioner did not have a weapon on his person or in his car, even though he was carrying, in a high crime area, $4,490.05 in cash from the store for deposit in the bank.

A fingerprint analysis of the firearms charged in the indictment did not produce any fingerprints of Petitioner on the firearms or from the paper bags in which they were seized. An ATF trace of the firearms also failed to connect Petitioner, in any way,

with the two (2) firearms seized from Dave's Mini-Mart on February 8, 1993.

The Government was unable to produce any witness, including store employees, that ever observed Petitioner in possession of the two (2) firearms charged; that was ever told by Petitioner to possess the two (2) firearms charged; that was ever instructed by Petitioner to possess the weapons; or, that was able to relate, in any way, that Petitioner had ever engaged in any conduct which would indicate an intention by Petitioner to exercise dominion and control over the firearms charged.

To the contrary, Bilal Rahman, Trina Shobe, Damita Davis and Mohammed Nasser all testified for the defense that they were employees at Dave's Mini-Mart during the time period alleged in the indictment; that the store was located in a violent and dangerous high-crime area and open 24 hours a day; that the two (2) firearms seized on February 8, 1993 were for the protection of the other store employees, as the response time to 9-1-1 calls was very poor; that Petitioner was the day manager and Nagib Afaneh was the night shift manager; that they never saw Petitioner possess a firearm, even when making large cash deposits; and, that they were each told by Petitioner that he could not possess a firearm because he had a criminal record and if an emergency existed at the store they should call 9-1-1.

In addition, Mohammed Nasser testified that Petitioner had told him that he [Petitioner] "could not touch a gun", because he had "gone to jail" and Nasser related this information to Special Agent Cavan when interviewed during this case. Nasser testified that after the two (2) firearms were seized from the store on February 8, 1993, he quit working at Dave's Mini-Mart because he no longer felt safe. Damita Davis also quit following the February 8, 1993 search and the seizure of firearms from the store; and, Trina Shobe reduced her hours.

Trina Shobe also testified that she had worked for the prior owner of the store, David Shears; and, that she assumed the prior owner left the two (2) firearms behind, because they looked the same and were located in the same places.

4. District Court's Judgment Of Acquittal:

Petitioner moved for a judgment of acquittal at the end of

Respondent's case; and, again at the close of all the evidence.

> "The Court: I want on the record that you've made it because then you are in a position to argue post-verdict if you have an adverse verdict. But I don't want to take any more time on it at this point." (Tr. 225-226).

District Court denied the motions, but noted:

After the jury returned its verdict of guilty as to both counts of the indictment, Petitioner made a motion to the District Court, pursuant to Rule 29(c) of the Federal Rules of Criminal Procedure, to enter an Order for Judgment of Acquittal. On March 1, 1995, the District Court filed a Memorandum Opinion granting Petitioner's Motion for Judgment of Acquittal. The Court reasoned that after examining all of the evidence in the record in the light most favorable to the Government, there was neither direct nor circumstantial evidence in the record which would justify reasonable minds in fairly concluding beyond a reasonable doubt that Petitioner had the intention, at the time alleged, to exercise dominion and control over the firearms charged. The Court concluded it's Memorandum Opinion by stating it was in error for not granting Petitioner's Rule 29 Motions when made during the course of trial.

> "Since the jury's guilty verdict, however, the Court has had the time to reflect and research the elements of constructive possession as required by the Sixth Circuit law. It is now apparent to the Court that it should have granted the Rule 29 Motions when they were made during the course of the trial." (A. 14, N.9).

5. <u>Per Curiam</u> Decision Of The Sixth Circuit Court Of Appeals:

While the <u>per curiam</u> decision entered by the Sixth Circuit Court of Appeals agreed there was no evidence Petitioner ever actually possessed the two (2) .38 caliber firearms located within the store for the protection of the store's employees, the <u>per curiam</u> panel rejected the findings made by the District Court on the issue of constructive possession by holding that a "rational fact finder"

could conclude Petitioner intended to himself possess the guns at the time in question, February 8, 1993, from Petitioner's position as the manager of the store's premises. (A. 3-4).

REASONS FOR GRANTING WRIT

I. CERTIORARI SHOULD BE GRANTED SO THIS COURT CAN DECIDE THE IMPORTANT FEDERAL QUESTION OF WHETHER AN ACCUSED CAN BE CONVICTED OF CONSTRUCTIVE POSSESSION OF A FIREARM BY A FELON, IN VIOLATION OF 18 U.S.C. §922(g)(1) ON THE BASIS OF CONDUCT OCCURRING DURING THE COURSE OF HIS LEGITIMATE EMPLOYMENT WHERE THE ACCUSED LACKED THE REQUISITE "MENS REA", OR CRIMINAL INTENT, TO ENGAGE IN WRONGDOING OR COMMIT AN UNLAWFUL ACT?

The subject matter of this Petition involves a question of exceptional importance affecting fundamental rights of all individuals accused of criminal wrongdoing in a state or federal prosecution.

Before the state or federal Government can deprive an accused of his or her fundamental right to life and liberty by conviction of a criminal offense, our system of Anglo-American jurisprudence has historically required the prosecution to produce evidence to prove beyond a reasonable doubt that the accused possessed a culpable mens rea, or criminal intent, to engage in an unlawful act.

The per curiam decision entered by the Court in the herein appeal has obliterated this fundamental requirement to allow for an accused to be convicted of a serious federal offense on the basis of his legitimate employment and without any evidence of intent to engage in criminal wrongdoing.

The per curiam decision is inconsistent with the Supreme Court's holding that it was the intent of Congress to make it unlawful for a firearm to be in the possession of a convicted felon. Scarborough v. United States, 431 U.S. 563, 576, 97 S.Ct. 1963, 52 L.Ed.2d 582 (1977); and, the historical policy of law requiring a culpable mens rea, or criminal intent, for the commission of a

criminal offense.

"In the criminal law, both a culpable mens rea and a criminal actus reus are generally required for an offense to occur." United States v. Apfelbaum, 445 U.S. 115, 131, 100 S.Ct. 948, 63 L.Ed.2d 250 (1980).

The per curiam decision reversed the judgment of acquittal entered by the District Court, pursuant to Rule 29(c) of the Federal Rules of Criminal Procedure; reinstated the jury's verdict of guilty against Petitioner for knowingly possessing, on or about February 8, 1993, two (2) .38 caliber firearms transported in interstate commerce, in violation of 18 U.S.C. §922(g)(1); and, remanded the matter to the District Court for sentencing. Because Petitioner was indicted as a felon with three (3) prior felony convictions for violence, the most recent occurring over ten (10) years ago, on February 9, 1983, Petitioner faces a mandatory minimum sentence of not less than 15 years, under 18 U.S.C. §924(e).

The per curiam decision is significant, because it enables an accused to be convicted of a serious federal crime, which was intended to be employed against the "worst, or at least among the worst criminals in the country"[2] on the basis of conduct performed during the course, and within the scope of, his legitimate employment as the day manager of a mini-mart.

Historically, the courts have required the presentation of evidence to establish that a felon has both the power and the intent, at the time alleged, to exercise the type of dominion and control of a firearm that comes with ownership or actual possession. United States v. Beverly, 750 F.2d 34 (6th Cir. 1984); United States v. Soto, 779 F.2d 558 (9th Cir. 1986); United States v. Blue, 957 F.2d 106 (4th Cir. 1992).

The Memorandum Opinion of the District Court articulated the fundamental requirement that the evidence establish beyond a reasonable doubt, the accused manifested a culpable mens rea, or criminal intent, to unlawfully possess a firearm.

---

[2]Reference is made to the remarks of Senator Spector, Subcommittee on Crime, September 23, 1982, p. 4-5 (H.R. 6386, S. 1688), concerning the combined effect of 18 U.S.C. §§922(g)(1) and 924(e) under the Armed Career Criminal Act of 1984.

"The difference between knowingly having the power to exercise dominion and control over contraband, and knowingly having the power and the intention to exercise dominion and control over contraband is subtle, but important. Certainly most individuals have the 'power' to become involved in criminal endeavors. What they typically do not have is the 'intention'. Some may know where contraband is available, and have the opportunity and financial or authoritative wherewithal to obtain it; but having that power alone should not make them criminals. Whether one merely has the power to engage in criminal endeavors versus whether one intends to exercise that power to engage in criminality would appear to be the better demarcation point between innocence and guilt." (Emphasis in original). (A. 10).

II. THE SIXTH CIRCUIT'S RULING IS IN CONFLICT WITH OTHER CIRCUIT COURTS AS NO OTHER CIRCUIT COURT HAS EVER DISPENSED WITH THE REQUIREMENT OF A CRIMINAL INTENT OR CULPABLE MENS REA TO COMMIT AN UNLAWFUL OFFENSE; AND, THE SIXTH CIRCUIT COURT'S RULING IS CONTRARY TO OHIO LAW.

Mere knowledge of and access to firearms by a convicted felon at his place of employment is insufficient to establish constructive possession of these firearms by a convicted felon. In conducting research for this Petition, counsel has been unable to find any case law authority in any jurisdiction which has allowed a conviction of a felon by the mere fact that the felon obtained legitimate employment at a store which had firearms present for the protection of its employees.

The per curiam decision of the Sixth Circuit Court of Appeals, however, is in direct contravention to an Ohio appellate court decision arising in the same jurisdiction and concerning the same exact issue.

In State v. Hardy, 60 Ohio App. 2d 325 (Cuy. Cty. 1978),

attached hereto at A. 19, the defendant was charged, under Ohio law (Ohio Rev. Code §2923.13), with being a felon in possession of a firearm. The defendant worked as a manager in a beverage store owned by a relative. The store was located in a dangerous, high crime area in Cleveland's inner-city, and the prosecution arose from an investigation conducted by the Cleveland Police Department. The defendant acknowledged to investigating officers knowledge of, and physical access to, a loaded weapon maintained at the store. The defendant was prosecuted for having constructive possession of a weapon maintained at the store for the protection of the store's employees.

The decision of the Eighth District Court of Appeals for Cuyahoga County, reversed the defendant's conviction on the grounds of insufficient evidence, finding that the defendant lacked criminal intent to possess the firearm:

> "The facts in the case at bar demonstrate only that Appellant, along with other employees, had knowledge of and physical access to a loaded rifle. The record fails to disclose any evidence demonstrating that Appellant ever exercised dominion or the sort of control over the weapon that comes with ownership or actual possession. Nor was there a showing that the unidentified owner had ever given Appellant permission to use the weapon.[3]
>
> If, however, the state had gone further and presented evidence to establish, for example, that the owner of the beverage store (the wife of Appellant) had obtained the gun at the direction of Appellant or at his request as a mere subterfuge, the evidence would tend to be supportive of the conviction. However, in the case at bar, where the only evidence is that Appellant, along with other

---

[3]The record does not contain any direct evidence of ownership, possession or control of the weapon by the Appellant. The extent of the circumstantial evidence is contained in a statement made by Appellant to the police in which he admitted knowledge that the rifle was "always ready to fire." This evidence, however, is insufficient on which to base a finding that the weapon was actually or constructively possessed by the Appellant. There are other reasonable explanations for knowledge concerning the readiness of the rifle for firing; e.g., he could have been informed of this fact by the store owner, or he may have seen the owner or other employees use the weapon.

employees, had physical access to the rifle, this Court is persuaded that such evidence does not support a finding that Appellant did 'have' [possession] of the firearm . . . " State v. Hardy, supra, 327-328.

The policy of law underlying the Hardy Opinion is that the judicial process should not punish a felon for obtaining legitimate employment in a store which has firearms on its premises for the protection of the store's employees, where the felon has never possessed the firearms or manifested an intent to possess the firearms.

The Sixth Circuit per curiam decision has rendered a finding — that a felon can be convicted of a criminal offense on the basis of his legitimate employment — which is contrary to all existing case law authority and repugnant to the fundamental concept of due process of law.

Accordingly, Petitioner, **MARWAN AFANEH**, prays this Honorable Court assert its jurisdiction and hear this case on its merits.

Respectfully submitted,

YELSKY & LONARDO CO., L.P.A.
BY: LEONARD W. YELSKY, ESQ.
Reg. No. 0034277
BY: ANGELO F. LONARDO, ESQ.
Reg. No. 0032274
1050 Leader Building
Cleveland, Ohio 44114
(216) 781-2550
Counsel for Petitioner

CERTIFICATE OF SERVICE

A true copy of the foregoing Petition for a Writ of Certiorari has been served upon Walter Dellinger, acting Solicitor General, Department of Justice, 10th and Pennsylvania Avenues, Room 5143, Washington D.C. 20530, by Overnight Delivery Service this ____ day of December, 1996.

_____

ANGELO F. LONARDO, ESQ.

APPENDIX

FILED

JULY 3, 1996

LEONARD GREEN, CLERK

No. 95-3321

UNITED STATES OF AMERICA

Plaintiff-Appellant,

v.

MARWAN AFANEH,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

(NOT RECOMMENDED FOR FULL-TEXT PUBLICATION)

BEFORE: NELSON and SILER, Circuit Judges, and WISEMAN, District Judge.*

PER CURIAM. The United States appeals a judgment of acquittal entered by the District Court for the Northern District of Ohio following a jury verdict of guilty against Defendant-Appellee Marwan Afaneh, We REVERSE.

In February 1993, state and federal investigators raided 25 stores in Cleveland, Ohio, as part of a food-stamp fraud investigation. One of those locations was Dave's Drive-In, owned by Intesar Afaneh and managed by her brother, Marwan. Marwan Afaneh was on the job when the officers arrived. Following orders to arrest all employees of the market, a Cleveland police officer immediately arrested and handcuffed Afaneh.

Officers then asked Afaneh about weapons on the premises. With Afaneh's assistance, officers recovered two unregistered .38 caliber handguns. They found one gun stored under the store's

*District Judge Thomas A. Wiseman, Jr., Middle District of Tennessee, sitting by designation.

cash register within three feet of where Afaneh was standing when the officers arrived. The other was hidden under a heating duct near the desk and safe in Afaneh's office. Both guns were loaded. A storewide search pursuant to warrant found twelve rounds of .38 caliber ammunition in Afaneh's desk, as well as ammunition for other types of handguns, but no other weapons. Afaneh denied owning the guns, though he said "he" or "they," referring to his sister and himself, might have given the prior store owner money for the guns. Investigators subsequently found no fingerprints on the weapons.

No food-stamp fraud charges were filed against Afaneh,[1] but in June 1993, a grand jury in the Northern District of Ohio indicted Afaneh on two counts of violating 18 U.S.C. § 922(g) in connection with the handguns recovered in the February 1993 search. When Afaneh was arrested on these charges pursuant to a bench warrant, he told the arresting officer, "I don't care, you know, I can do the time. I can go back to prison."

During trial, Afaneh stipulated that he was a convicted felon and that the guns had traveled in interstate commerce, the jurisdictional predicates of 18 U.S.C. § 922 (g). The only issue remaining at trial was whether Afaneh actually or constructively possessed the guns. The jury convicted Afaneh Jan. 19, 1995, on both counts. Despite having rejected Afaneh's motions for judgment of acquittal both following the government's case and at the close of all proof, Judge David Dowd, Jr., granted Afaneh's post-trial motion for judgment of acquittal pursuant to Fed. R. Crim. P. 29(c).

II

Fed. R. Crim. P. 29(c) permits a trial court to set aside a jury verdict and enter a judgment of acquittal when "after viewing the evidence in the light most favorable to the prosecution," the trial court finds that no rational trier of fact "could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979). In reviewing a District Court's order of acquittal, we apply the same standard to the record before us, assuming "the truth of the evidence offered by the prosecution." United States v. Connery, 867 F.2d 929, 930 (6th Cir. 1989)(quoting United States v. Martinez, 763 F.2d 1297, 1312

---

[1]In United States v. Afaneh, 28 F.3d 1214, text at 1994 WL 362092 (6th Cir. 1994), this Court held Afaneh's February 1993 arrest unlawful for lack of probable cause.

(11th Cir. 1985)).

The only question before us on appeal is whether any rational trier of fact could have found that Afaneh actually or constructively possessed the firearms recovered from Dave's Drive-In. As there is no evidence of Afaneh actually possessing the weapons, we must examine the proof in light of our holdings regarding constructive possession.

Our test for constructive possession in § 922(g) cases has been straightforward. "Constructive possession requires that a person knowingly have power and intention to exercise control over an object." United States v. Critton, 43 F.3d 1089, 1096 (6th Cir. 1995) (citing United States v. Craven, 478 F.2d 1329, 1333 (6th Cir.), cert. denied, 414 U.S. 866 (1973)). Unlike the facts of United States v. Beverly, 750 F.2d 34, 37 (6th Cir. 1984), when we reversed a constructive possession conviction, there is no dispute as to Afaneh's power as store manager to control the weapons. Given that, the sole issue is whether he possessed the requisite intent to control them. As the District Court held, "Whether one merely has the power to engage in criminal endeavors versus whether one intends to exercise that power to engage in criminality would appear to be the better demarcation between innocence and guilt." United States v. Afaneh, mem. op. at 9 (N.D. Ohio March 1, 1995). We believe the District Court captured the essence of the legal proposition; we take exception under Jackson to its application of the standard to the evidence presented at trial.

We note initially that the intent with which we are concerned is merely the intent to possess weapons that have traveled in or have affected interstate commerce. While that is normally permissible, for a convicted felon such as Afaneh, it is criminal. The District Court found Afaneh lacked this possessory intent.

Though intent is a subjective issue, it may be inferred from objective evidence. Craven, 478 F.2d at 1333; Critton, 43 F.3d at 1096 (finding defendant with control over vehicle and its contents constructively possessed bag under her seat containing drugs). Considering the evidence in the light most favorable to the government, we find a rational trier of fact could have concluded Afaneh intended to possess the guns from the following facts:

> 1. The location of the firearms. Police recovered one handgun from a hidden location in Afaneh's own office and another from directly under the register where Afaneh was working the day of his initial arrest.

2. Ammunition in Afaneh's desk matching the firearms.

3. Afaneh's statement to an FBI agent following his arrest that he "maintained" a weapon on the premises.

4. Afaneh's statements that "he" or "they" may have purchased the handguns by paying a premium to the store's previous owner.

5. Afaneh's position as manager of the premises. "It follows that constructive possession also exists when the person has dominion over the premises where the firearm is located." United States v. Clemis, 11 F.3d 597, 601 (6th Cir. 1993).

From this evidence, a rational factfinder may conclude, by drawing all inferences in the government's favor, that Afaneh not only had the power to control the handguns, he intended to, as well.

Afaneh's arguments — that other employees had access to the guns, that he did not carry them on his person when he left the store to make bank deposits, that he did not mean to say he "possessed" the weapons when he affirmatively responded that he "maintained" them, that he assisted officers in recovering them — require a factfinder to draw inferences in his favor. The jury had the opportunity to do this at trial, but, obviously, drew the opposite permissible inferences.

Therefore, we REVERSE the District Court's judgment of acquittal, REINSTATE the jury's verdict, and REMAND this matter to the District Court for sentencing and any other appropriate proceedings.

FILED
95 MARCH-1 P.M. 2:20
Clerk, U.S. District Court
Northern District of Ohio
Akron

DOWD, J.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

UNITED STATES OF AMERICA,	)	Case No. 1:93 CR 0175
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
MARWAN AFANEH,	)	**MEMORANDUM OPINION**
	)	
Defendant.	)	

I. INTRODUCTION.

The Court has for resolution the motion of the defendant, Marwan Afaneh, for a judgment of acquittal entered timely pursuant to the provisions of Rule 29(c) of the Federal Rules of Criminal Procedure. (Docket No. 103). The government has filed its brief in opposition (Docket No. 104) and the defendant has filed his reply. (Docket No. 105).

The defendant was indicted on June 3, 1993 on two counts of possession of firearms as a convicted felon in violation of 18 U.S.C. § 922(g)(1) and punishable under 18 U.S.C. § 924(e). The June indictment followed the search of Dave's Drive-Thru Mini Mart at 11625 Superior Avenue in Cleveland, Ohio pursuant to a search warrant issued as a result of an investigation conducted by the Cleveland Police Department for alleged food stamp violations. The defendant and other employees of the Drive-Thru were present

when the search warrant was executed.[1] After the defendant was arrested and handcuffed, he was asked if any firearms were on the premises and he answered in the affirmative and directed the search party to the location of the two firearms.

Following his indictment, the defendant moved to suppress his statements as violative of his constitutional rights. This Court sustained the motion on the determination that the defendant had been interrogated about the location of firearms following his unlawful warrantless arrest.[2]

The government prosecuted an interlocutory appeal and by a 2-1 vote in an unpublished opinion, United States v. Afaneh, 28 F.3d 1214 (6th Cir. 1994), cert. denied, — U.S.—, 115 S. Ct. 576 (1994), the Sixth Circuit, while agreeing that the arrest of the defendant was unlawful, ruled that the defendant's statement indicating the location of the two firearms was admissible[3] citing as authority the recent opinion of United States v. Fountain, 2 F.3d 656 (6th Cir.), cert. denied, — U.S. —, 114 S. Ct. 608 (1993).

The case proceeded to trial on January 17, 1995 and the jury returned a verdict of guilty on January 19, 1995. The above described motion followed.

II. A SUMMARY OF THE TESTIMONY PRESENTED.

The primary evidence presented by the government was the testimony of FBI Agent Roy Cavan who was a member of the searching party on February 8, 1993. He testified that he asked the

---

[1]The affidavit for the search warrant for Dave's Drive Thru described two unlawful events in connection with food stamp transactions on February 2, 1993. However, no arrests or prosecutions for food stamp violations connected to Dave's Drive Thru followed the search of February 8, 1993 other than the instant prosecution of the defendant.

[2]The Court conducted the evidentiary hearing on the defendant's motion to suppress on July 23, 1993 and published its opinion granting the motion on August 3, 1993. The Fountain decision, infra, on which the Sixth Circuit relied in reversing this Court, was announced on August 9, 1993.

[3]The interlocutory appeal did not address the defendant's claim that this court erred in refusing to suppress the firearms as the fruit of a poisonous tree. The defendant argued that this Court erred in using a "public safety" exception to allow testimony concerning the discovery of the firearms, but the Sixth Circuit held that it had no jurisdiction to address that issue and so it remains preserve for appeal.

defendant if he "maintained"[4] any firearms on the premises and that the defendant then showed Cavan and the other officers present where the two firearms were located, one under a cash register and the other in a heating duct. The government insists that the defendant's knowledge concerning the location of the hidden firearms, combined with his managerial role in the operation of the store and his historical account of how the firearms came to be on the premises justifies a reasonable juror in deciding beyond a reasonable doubt that the defendant had constructive possession of the firearms.

Dave's Drive-Thru is located in a high-crime area on the east side of Cleveland where numerous Arab-American grocery store owners and operators have been murdered. The store had many other employees including Mohammed Nasser, Najib Afaneh, Bilal Rahman, Trina Shobe, Damita Davis and Jerome Coleman who had access to and knowledge of the two firearms. The government offered no testimony that the defendant ever had actual possession of either of the two firearms.[5]

III. THE RESPECTIVE POSITIONS OF THE PARTIES.

The government's position is that the defendant's admissions on the day of the search concerning the location of the two firearms, combined with his managerial role in the operation of the business, and his subsequent statement at the time of his June arrest as a result of the indictment to the effect that "he could do the time," constitutes sufficient evidence to deny the motion.

---

[4]Special Agent Cavan was initially questioned by the prosecution during the evidentiary hearing conducted on July 23, 1993 concerning the admission of the defendant. He was asked by the prosecution if he made any inquiries of Mr. Afaneh. Cavan responded by stating: "Yes. Shortly after that for the safety of the personnel on the scene, I asked Mr. Afaneh were there any firearms present in the store." (See Tr. of Evidentiary Hearing at p.13). During the trial, Cavan modified his evidentiary hearing testimony and indicated that he asked the defendant if he "maintained any weapons." Counsel for the defendant successfully impeached Cavan based on his evidentiary hearing testimony and then the government produced the written report of Cavan, prepared prior to the evidentiary hearing which demonstrated that he had used the word "maintained" in his written report. Over defense objections, the Court allowed in an extract of Cavan's report to be admitted as an exhibit.

[5]The defendant was indicted in June of 1993, four months after the search. The defendant was arrested on a warrant, rather than being issued a subpoena to appear. He was arrested by FBI agents while on the way to the bank with over Four Thousand Dollars in cash and the search of his person and vehicle for weapons revealed the absence of any firearms.

The defendant argues that, viewing the evidence in a light most favorable to the prosecution, the evidence demonstrates at most that the defendant had knowledge of the location of the firearms in an area where a number of persons, including the defendant, had access to the firearms. The defendant, citing U.S. v. Beverly, 750 F.2d 34 (6th Cir. 1984), argues that knowledge and access, standing alone, fall short of the proof necessary to demonstrate constructive possession.[6]

IV. THE APPLICABLE LAW.

The motion for a verdict of acquittal requires an in-depth examination of two issues. First, the Court must be guided by the law which applies in considering a motion for a judgment of acquittal. Second, given the nature of the government's proof in this case, the Court must consider the concept of constructive possession of a firearm as the government's case rests on the proposition that it proved that the defendant had, in fact, constructive possession of the two firearms on February 8, 1993 when he responded affirmatively to Special Agent Cavan's request to identify the location of weapons at Dave's Drive Thru.

A. STANDARD TO APPLY TO A MOTION FOR JUDGMENT OF ACQUITTAL.

The case of United States v. Conti, 339 F.2d 10, 13 (6th Cir. 1964) teaches that the court must view the evidence and the inferences that may justifiably be drawn in the light most favorable to the government and if the court concludes that a reasonable mind might fairly conclude guilt beyond a reasonable doubt, the motion should be overruled. See also United States v. Connery, 867 F.2d 929, 930 (6th Cir. 1989); United States v. Craven, 478 F.2d 1329, 1333 (6th Cir.), cert. denied, 414 U.S. 866 (1973).

Recent decisions in the Eleventh Circuit dealing with sufficiency of the evidence state the standard in slightly different, and arguably, easier terms to apply. The case of United States v. Brown, 40 F.3d 1218 (11th Cir. 1994) holds that if the record "reveals a lack of substantial evidence from which a fact-finder

---

[6]The defendant emphasizes what the evidence failed to demonstrate, i.e. the absence of evidence of actual possession; the fact that the fingerprint analysis of the two firearms did not disclose the defendant's fingerprints; the A.T.F. trace of the firearms failed to connect the defendant to the firearms; and the absence of any evidence that the defendant had instructed any of the employees concerning the use of the firearms.

could find guilt beyond a reasonable doubt, we must reverse the defendant's conviction." Id. at 1222 (quoting United States v. Harris, 20 F.3d 445, 452 (11th Cir.), cert. denied, — U.S. —, 115 S. Ct. 434 (1994)).

B. CONSTRUCTIVE POSSESSION.

The elements or indicia of the concept of constructive possession require close scrutiny in this case. Courts have set forth different tests for constructive possession, but the rule in the Sixth Circuit has been long established. Still cited with approval today, the case of United States v. Craven, 478 F.2d 1329, 1333 (6th Cir.), cert. denied, 414 U.S. 866 (1973) held:

> Possession may be either actual or constructive and it need not be exclusive but may be joint. . . . Actual possession exists when a tangible object is in the immediate possession or control of the party. Constructive possession exists when a person does not have actual possession but instead knowingly has the power and the intention at a given time to exercise dominion and control over an object, either directly or through others. United States v. [Virciglio], 441 F.2d 1295 (5th Cir. 1971); United States v. Burch, 313 F.2d 628 (6th Cir. 1963). Both actual possession and constructive possession may be proved by direct or circumstantial evidence.

Id. at 1333 (citations omitted in part) (emphasis added). See also United States v. Moreno, 933 F.2d 362, 373 (6th Cir.) (quoting Craven), cert. denied, 502 U.S. 895 (1991). Accord Black's Legal Dictionary at 1163 (6th ed. 1990) (defining possession).[7] Importantly, both the Virciglio and Burch cases cited with approval by Craven acknowledged the essential requirement of proof of

---

[7]In United States v. Birmley, 529 F.2d 103, 107 (6th Cir. 1976), the court misquotes United States v. Craig, 522 F.2d 29, 32 (6th Cir. 1975). The Court in United States v. Poulos, 895 F.2d 1113, 1119 (6th Cir.), abrogated on other grounds by Horton v. California, 496 U.S. 128, 145, 153 (1990), carries the Birmley error forward into its own decision. Despite language to the contrary in Birmley and Poulos, the Craven test requires that "a person knowingly have the power and the intention" to exercise dominion and control. Accord Craig, 522 F.2d at 32.

intent. See Virciglio, 441 F.2d at 1398 ("[T]here was ample basis for the jury to find that he did have constructive possession, that is, he did have the intention and the power to exercise dominion and control over the machine gun."); Burch, 313 F.2d at 629 (including proof of intention as part of the constructive possession test). The Second and Seventh circuits also follow the Sixth Circuit's lead in formulating the constructive possession test. See United States v. Tribunella, 749 F.2d 104, 111-12 (2d Cir. 1984) (following Craven); United States v. Stockheimer, 807 F.2d 610, 615 (7th Cir. 1986) (endorsing intent language), cert. denied, 481 U.S. 1018 (1987).

Other circuits, however, recite different formulations of the constructive possession test. The Fourth Circuit's test, first coalesced in United States v. Laughman, 618 F.2d 1067 (4th Cir.), cert. denied, 447 U.S. 925 (1980), states "[c]onstructive possession exists when the defendant exercises, or has the power to exercise, dominion and control over the item." Id. at 1077 (citation omitted). See also United States v. Bell, 954 F.2d 232, 235 (4th Cir. 1992). The Ninth Circuit has stated, "[o]ne has constructive possession of contraband if he knows of its presence and has power to exercise dominion and control over it." Williams v. United States, 418 F.2d 159, 162 (9th Cir. 1969), aff'd, 401 U.S. 646, 651 n.1 (1971) (The Supreme Court refused to reach the question of constructive possession on appeal.).[8]

The difference between knowingly having the power to exercise dominion and control over contraband, and knowingly having the power and the intention to exercise dominion and control over contraband is subtle, but important. Certainly most individuals have the "power" to become involved in criminal endeavors. What they typically do not have is the "intention." Some may know where contraband is available, and have the opportunity and financial or authoritative wherewithal to obtain it; but having that power alone should not make them criminals. Whether one merely has the power to engage in criminal endeavors versus whether one intends to exercise that power to engage in criminality would appear to be the better demarcation point between innocence and guilt. An examination of the majority and dissenting opinions from a

---

[8]Compare the instruction cited with approval in Arellanes v. United States, 302 F.2d 603, 611 n. 8 (9th Cir. 1962) (reciting the intention element), cert. denied, 371 U.S. 930 (1962), with the authorities the Arellanes case cites such as Mathes, "Some Suggested Forms for Use in Criminal Cases," 20 F.R.D. 231, 278 (1957) (Form 55 omitting the "intention" language from the definition of constructive possession).

Pennsylvania Supreme Court decision makes the case in point.

Although acknowledging prior state precedent which defined constructive possession as "conscious dominion" or "the power to control the contraband and the intent to exercise that control," the Pennsylvania Supreme Court allowed a conviction for constructive possession to stand where contraband was found in an area of "joint control and equal access." Commonwealth v. Mudrick, 510 Pa. 305, 309, 507 A.2d 1212, 1214 (1986). The dissent, however, offered that under the majority's legal-fiction test of joint control and equal access "there would appear to be no sure way for an innocent resident or occupant of a room to disassociate himself from its contents, for he is implicitly demonstrating an intent to control whether he acknowledges or ignores the contents." Mudrick, 510 Pa. at 311 n. 1, 507 A.2d at 1215 n. 1 (Zappala, J., dissenting). See also Mark I. Rabinowitz, Note, Constructive Possession, Must the Commonwealth Still Prove Intent?—Commonwealth v. Mudrick, 60 Temple L.Q. 445 (1987). The approach taken by the majority in Mudrick can be contrasted to the approach of the Sixth Circuit which has retained the intent aspect of constructive possession.

In United States v. Moreno, 933 F.2d 362 (6th Cir. 1991), the court of appeals affirmed a jury conviction of a felon for unlawful possession of a firearm pursuant to 18 U.S.C. §922(g). Defendant contended that since he was in custody at the time the firearms were found at his residence there was insufficient evidence of constructive possession. 933 F.2d at 372. The court rejected defendant's argument stating, "[i]n addition to evidence linking [defendant] to the residence where the firearms were discovered, there was evidence which corroborated his tape recorded statement that he owned a rifle with a powerful scope which he pointed at neighbors he believed to be cooperating with the police." 933 F.2d at 373. Evidence that a similar rifle was found at his residence proved that defendant not only knew he had the power to exercise control over the rifle, but that he had the intent to exercise such control at the relevant time. See id.

The evidence of intention present in Moreno can be contrasted to the evidence that was found lacking in United States v. Wilson, 620 F.Supp. 104 (M.D. Tenn. 1985), aff'd, 774 F.2d 1164 (6th Cir. 1985) (table). The Wilson court held that reasonable minds could not conclude beyond a reasonable doubt that defendant, a convicted felon, had constructive possession of a shotgun merely on evidence that it was located in the corner of a closet of the bedroom occupied jointly by himself and his wife. 620 F.Supp. at 106. The

same is true of United States v. Beverly, 750 F.2d 34 (6th Cir. 1984). In Beverly defendant was found in a friend's kitchen while he was standing close to a wastebasket which contained two guns, one of which revealed defendant's fingerprint. That evidence alone was insufficient to establish constructive possession beyond a reasonable doubt. 750 F.2d at 37.

In United States v. Craig, 522 F.2d 29 (6th Cir. 1975) the court of appeals acquitted defendant Craig partially on grounds that the evidence was insufficient to establish illegal possession of drugs. The evidence at trial established that Craig drove a passenger to an apartment whereupon the passenger delivered a closed box of drugs. 522 F.2d at 31. There was no evidence that Craig knew of the contents of the box. 522 F.2d at 32. When the passenger was apprehended by authorities, Craig fled the scene driving at high speed in a truck in which a shotgun was later found. 522 F.2d at 31. The court acknowledged the Craven test for constructive possession, but found the evidence insufficient to support a conviction for illegal possession. 522 F.2d at 32.

> Here there is no showing that Craig has the intent to exercise control over the drugs or that he had the knowledge necessary for conviction of illegal possession.
>
> . . .
>
> . . . The weakness in the government's case is that there is nothing to link Craig's flight from the police with possession of drugs. Lacking proof of intent and knowledge, elements required to support conviction on the specific charge of illegal possession of a controlled substance, the government's case must fail.

522 F.2d at 32. Compare Mudrick, 510 Pa. at 310-11, 507 A.2d at 1215 (Zappala, J., dissenting) ("[T]he majority permits evidence which goes only to the Appellee's power to control the premises to support an inference of possession of the contraband. . . . No evidence is cited, for none is present in the record, which is relevant to proving the Appellee's intent to control the contraband.").

Of course, "[m]ere presence on the scene plus association with illegal possessors is not enough to . . . show the requisite knowledge, power, or intention to exercise control over [a firearm]." United States v. Birmley, 529 F.2d 103, 107-08 (6th Cir.

1976) (citing in part Craig, supra). Even so, "substantial 'other' incriminating evidence, combined with presence, [can] serve to demonstrate [defendant's] constructive possession of the firearm at issue." United States v. Poulos, 895 F.2d 1113, 1119 (6th Cir.) (citing Birmley), abrogated on other grounds by Horton v. California, 496 U.S. 128, 145, 153 (1990).

In Poulos (although reciting the wrong test, supra n. 7), the court of appeals found the evidence sufficient to support a finding of constructive possession of an illegal weapon by defendant Poulos. The court sustained the conviction based on substantial "other" incriminating evidence beyond the mere fact of Poulos' presence at the scene where an undercover agent purchased an illegal weapon from the supplier. 895 F.2d at 1119. Testimony indicated that Poulos had requested the weapon from the supplier originally, had stated that he "might let [the agent] use it," had stated "we can work it out" in response to the agent's desire for the weapon, and finally had accepted one hundred dollars from the agent with the understanding that the supplier would deliver another weapon later. 895 F.2d at 1119. The substantial other evidence which convicted Poulos went beyond demonstrating that he knew he had the power to exercise control over the weapon, but also showed that he accepted one hundred dollars at a time when intended to relinquish his veto authority over the sale. Thus, although substantial "other" incriminating evidence combined with presence can demonstrate constructive possession, that "other" evidence still must address the intent and knowledge requirements of the constructive possession test.

With this review of the case law of constructive possession in mind, the Court turns to an examination of the government's case.

V. IS THE EVIDENCE SUFFICIENT TO WITHSTAND DEFENDANT'S MOTION FOR A JUDGMENT OF ACQUITTAL?

The testimony comprising the substance of the government's proof on the issue of the defendant's alleged constructive possession of the two firearms is not in dispute. The defendant's unchallenged admissions to Special Agent Cavan on February 8, 1993 established the defendant's knowledge and accessibility to the firearms. Moreover, the testimony, viewed in a light most favorable to the government demonstrates the defendant's control over the premises in his capacity as a manager of the business. The pivotal issue that emerges is whether the proof

is such that it also justifies the jury's verdict on the issue of the defendant's "intention, at the given time," to possess the two firearms. That intention at the given time could be proved directly or by circumstantial evidence. The Court has examined the evidence in the record and has concluded that there is neither direct or circumstantial evidence in the record that would justify reasonable minds in fairly concluding beyond a reasonable doubt that the defendant had the intention, at the time of his admissions as to the knowledge and location of the weapons, to exercise dominion and control over the firearms. The Court acknowledges that under the Fourth and Ninth Circuit tests the evidence would support a finding of guilt. In this case, however, not only did the Court instruct the jury on the Sixth Circuit test for constructive possession, but that test is the better reasoned test as well. As a consequence, the Court finds that the defendant's motion for a judgment of acquittal must be and is granted.[9]

---

[9]The Court denied the motion for acquittal at the close of the government's case and again at the close of all the testimony. Fed. R. Civ. P. 29(a) and 29(b). Had the Court granted either motion, the case would have been over and the government would have been without recourse as the Court's ruling would not have been subject to appeal. See Smalis v. Pennsylvania, 476 U.S. 140 (1986) (where a judgment of acquittal is based on the insufficiency of evidence no appeal may be taken); Arizona v. Rumsey, 467 U.S. 203, 211 (1984) ("Reliance on an error of law . . . does not change the double jeopardy effects of a judgment that amounts to an acquittal on the merits."); United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977) (double jeopardy bars retrial after entry of judgment of acquittal if the judgment represents a ruling on the merits of "some or all of the factual elements of the offense charged"); Malinovsky v. Court of Common Pleas of Lorain County, 7 F.3d 1263, 1269 (6th Cir. 1993) (recognizing that in most circumstances there can be no retrial if defendant receives a judgment of acquittal), cert. denied, — U.S. —, 114 S.Ct. 1300 (1994). Since the jury's guilty verdict, however, the Court has had the time to reflect and research the elements of constructive possession as required by Sixth Circuit law. It is now apparent to the Court that it should have granted the Rule 29 motions when they were made during the course of the trial. Unlike judgments of acquittal under Rules 29(a) and (b), however, the present acquittal pursuant to Rule 29(c) following a guilty verdict is appealable by the government. United States v. Maddox, 944 F.2d 1223, 1232-33 (6th Cir. 1991) (citing United States v. Wilson, 420 U.S. 332, 345, 352-53 (1975) (prosecution could appeal from a judgment of acquittal entered by the trial judge after the jury had returned a verdict of guilty where no new fact finding would be necessary to restore the jury's verdict)).

VI. CONCLUSION.

The defendant's motion for a judgment of acquittal is granted.

IT IS SO ORDERED.

_____

David D. Dowd, Jr.
U.S. District Judge

FILED

SEPTEMBER 4, 1996

LEONARD GREEN, CLERK

No. 95-3321

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	ORDER
	)	
MARWAN AFANEH,	)	
	)	
Defendant-Appellee.	)	

BEFORE: NELSON and SILER, Circuit Judges, and WISEMAN, District Judge.*

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

---

*Hon. Thomas A. Wiseman, Jr., Senior United States District Judge for the Middle District of Tennessee, sitting by designation.

Leonard Green, Clerk

RECEIVED
September 11, 1996
LEONARD GREEN, CLERK

IN THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA	:	CASE NO. 95-3321
	:	
Plaintiff-Appellant,	:	
	:	**FILED**
v.	:	SEPTEMBER 11 1996
	:	**LEONARD GREEN, Clerk**
MARWAN AFANEH,	:	
	:	
Defendant-Appellee.	:	

MOTION FOR STAY OF MANDATE PENDING APPLICATION TO THE SUPREME COURT FOR A WRIT OF CERTIORARI

Now comes the Defendant-Appellee, **MARWAN AFANEH**, by and through his undersigned counsel, and respectfully moves this Honorable Court, pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, to enter an Order granting a stay of the mandate in the herein Appeal pending the application by Defendant-Appellee to the Supreme Court for a Writ of Certiorari.

Respectfully submitted,

YELSKY & LONARDO CO., L.P.A.
BY: LEONARD W. YELSKY, ESQ.
Ohio Reg. No. 0034277
BY: ANGELO F. LONARDO, ESQ.
Ohio Reg. No. 0032274
Counsel for Defendant
1050 Leader Building
Cleveland, Ohio 44114
(216) 781-2550

MOTION GRANTED
FILED 9-20-96
BY THE CLERK PURSUANT TO
RULE 8(B) SIXTH CIR. RULES
LEONARD GREEN, Clerk
COPIES MAILED 9-20-96

THE STATE OF OHIO, APPELLEE, v. HARDY, APPELLANT.

[Cite as State v. Hardy (1978), 60 Ohio App. 2d 325.]

Criminal law—Having weapon while under disability—R.C. 2923.13 construed—Actual possession requires ownership or physical control—Right of self-defense not restricted.

1. In order to "have" a firearm or dangerous ordnance within the meaning of R.C. 2923.13, an individual must either actually or constructively possess it. Actual possession requires ownership and, or, physical control. Constructive possession may be achieved by means of agent.

2. The protections contained in provisions of R.C. 2923.13 do not restrict the right of an individual under a disability from acting in self-defense, when he or she did not knowingly acquire, have, carry or use a firearm previously.

(No. 37761—Decided December 21, 1978.)

APPEAL: Court of Appeals for Cuyahoga County.

Mr. John T. Corrigan, for appellee.
Messrs. Adrine & Adrine, for appellant.

Jackson, J. On December 15, 1976, the defendant-appellant, Sylvester Hardy, was indicted by a Cuyahoga County grand jury. He was charged with having a weapon while under disability, in violation of R.C. 2923.13. Defendant entered a plea of not guilty, waived his right to a jury trial, and proceeded to trial before the Court.

The facts which form the basis of the charge are not in dispute and may be summarized as follows:

The defendant had a prior conviction for a drug related offense. Consequently, he was prohibited by provisions of R.C. 2923.13 from knowingly acquiring, having, carrying or using a firearm or dangerous ordnance.

On November 22, 1976, the defendant was working in a beverage store located at 3079 East 123rd Street in Cleveland,

Ohio. The beverage store was owned by the wife of the defendant. An employee, George Winfield, who had not been in to work the previous two days, entered the premises and approached the defendant. He told the defendant that he had been forced to leave his sister's home where he had been living, and that he needed some money to pay the rent at a rooming house. Defendant told him payday was Saturday, but agreed to give him some money, if he returned at closing time.

Winfield responded that he needed the money immediately, and proceeded to help himself to money in the cash box. When defendant objected, Winfield grabbed for a rifle located at the corner of the counter; defendant also grabbed for the gun[1] and was able to snatch it away from Winfield. In so doing, defendant fell back against a wall. He saw Winfield grab a razor, which the defendant had been using to cut price tags, and leap over the counter which separated the two men. Defendant then fired the rifle twice at Winfield, wounding him. After taking Winfield to a hospital, defendant called the police.

Defendant was subsequently charged as having "***knowingly acquired, had, carried or used a firearm***" while under disability.

The trial judge found defendant guilty of "having" a firearm while under disability, specifically noting for the record that by his "reading of the statute," self-defense was not a defense under the provisions of R.C. 2923.13.

Defendant was sentenced to a term of six months to five years and a fine of $500. Imposition of sentence was stayed by the trial court pending appeal.

On appeal the defendant-appellant assigns a single error for review by this Court:

"The trial court erred in finding the defendant-appellant guilty of violating Ohio Revised Code Section 2923.13 when the weapon involved did not belong to the defendant-appellant and was used solely for the purpose of self-defense, in the exercise of his rights under the United States and Ohio Constitution."

The legal issue before this Court is actually two-fold: first, whether or not the appellant did "have" the weapon within the

---

[1]The record reveals that appellant was aware that the rifle was loaded and ready to be discharged.

meaning of the statute at any point in time prior to the incident which resulted in the shooting of Winfield; and, second, assuming appellant did "have" the weapon at the moment he fired it, whether or not self-defense is a valid defense premised upon the undisputed facts of this case.

Initially we must consider the meaning of the word "have" as used in R.C. 2923.13. The word is a new addition to the disability statute enacted in 1974, and has not yet been judicially interpreted.[2]

In order to "have" a firearm, one must either actually or constructively possess it. Actual possession requires ownership and, or, physical control. Constructive possession may be achieved by means of an agent.

The facts in the case at bar demonstrate only that appellant, along with other employees, had knowledge of and physical access to a loaded rifle. The record fails to disclose any evidence demonstrating that appellant ever exercised dominion or the sort of control over the weapon that comes with ownership or actual possession. Nor was there a showing that the unidentified owner had ever given appellant permission to use the weapon.[3]

If, however, the state had gone further and presented

---

[2]The statute under which appellant was charged was effective in 1974. It differs in part from the predecessor statute in that in place of the prior language which declared that a prescribed class of persons could not "purchase, own, possess, receive, carry, control or use any firearm" (see former R.C. 2923.56), it substituted language which stated that certain persons may not "knowingly acquire, have, carry or use any firearm."

The terminology "carry" and "use" are retained. The word "acquire" appears to be equivalent to the words "purchase" and "receive;" and where the words "own," "possess" and "control" have been deleted from the current statute, the word "have" has been substituted.

[3]The record does not contain any direct evidence of ownership, possession or control of the weapon by the appellant. The extent of the circumstantial evidence is contained in a statement made by appellant to the police in which he admitted knowledge that the rifle was "always ready to fire." This evidence, however, is insufficient on which to base a finding that the weapon was actually or constructively possessed by the appellant. There are other reasonable explanations for knowledge concerning the readiness of the rifle for firing; e.g., he could have been informed of this fact by the store owner, or he may have seen the owner or other employees use the weapon.

It may well be that if further evidence had been adduced, the prosecutor could have developed a case establishing that appellant "had" the weapon. However, with the record in this posture, such a conclusion is not only reasonable inference which could be drawn.

evidence to establish, for example, that the owner of the beverage store (the wife of appellant) had obtained the gun at the direction of appellant or at his request so that her possession of the weapon could be construed as a mere subterfuge, the evidence would tend to be supportive of the conviction. However, in the case at bar, where the only evidence is that appellant, along with other employees, had physical access to the rifle, this Court is persuaded that such evidence does not support a finding that appellant did "have" the firearm within the meaning of R.C. 2923.13 prior to November 22, 1976.

Next we consider whether the defendant-appellant did "have" the weapon within the meaning of the statute at the moment he fired the gun at Winfield. As a matter of logic, in order to use the weapon, appellant was required to at least temporarily possess or temporarily "have" the weapon in his possession. It must be a fact that anyone who uses a weapon must be considered to "have" it, if only momentarily, although when one has a weapon, he need not necessarily use it.

We conclude, therefore, that the moment at which appellant fired the gun, he technically came within the meaning of the term "have" as used in the statute. Consequently, we are faced squarely with the question of whether the state may by law prohibit an individual under disability from utilizing an available firearm or dangerous ordnance in self-defense, when confronted with an overt physical threat or assault on his person by another individual with a deadly weapon.

Ohio courts have generally recognized that self-defense is a "right" to which the people are entitled.[4] Indeed, our courts are bound to so conclude in view of the provisions of both the Ohio and United States Constitutions. Given this important and constitutional

---

[4]See, e.g., State v. Melchior (1978), 56 Ohio St. 2d 15, 21; State v. Champion (1924), 109 Ohio St. 281, 284; and State v. Nieto (1920), 101 Ohio St. 407 (Wanamaker, J. dissenting). See also Rutherford v. M'Faddon (S. Ct. 1807), reported in E. Pollack, Ohio Unreported Decisions prior to 1823 (Allen Smith Co.), which explains that the Ohio Constitution of 1802, as well as that of 1851, protected the right of the people to self-defense.

basis for the right of self-defense, our response to this question must be in the negative. Section 1, Article I, of the Ohio Constitution, provides in part:

"All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life***and seeking and obtaining***safety."

The Fifth and Fourteenth Amendments to the United States Constitution provide that a person may not be deprived of his life, liberty or property without due process of law. Obviously, the state may not require and does not intend that an individual succumb to his attacker and possibly forfeit his life rather than act in self-defense. Given this important and constitutional basis for the right of self-defense, our response to this question must be in the negative.

Having previously concluded that the accused did not "have" the rifle within the meaning of the disability statute before the incident occurring on November 22, 1976, we now further conclude that his act of firing the gun in protecting the property of his employer and in defense of his person is neither a crime nor an unlawful act. We are not persuaded that it was the intent of the General Assembly in the enactment of R.C. 2923.13 to achieve such a result, nor is it possible for provisions of a statute to overcome the constitutional protection of the right to defense of self in this manner.[5]

Provisions of R.C. 2923.13 prohibit an individual from "knowingly" having or using a firearm. A legitimate act of self-defense is much more a mere reflex action than one committed voluntarily. As the United States Supreme Court declared more than a half century ago: "Detached reflection cannot be demanded in the presence of an uplifted knife." Brown v. United States (1921), 256 U.S. 335, 343.

The California Supreme Court has recently reached a similar conclusion on this issue in a case analogous to the case at bar. A California statute prohibits a felon from possessing a concealable

---

[5]A contrary result in this narrow fact situation would constructively serve neither society nor the individual under disability. Such a result would infringe on the ability of an individual affected by R.C. 2923.13 to find gainful employment as well as restrict the right of an owner of a shop to protect his life and property. The possible rehabilitative effects of gainful employment on the individual under disability outweigh any argument to further restrict what are, in reality, already difficult opportunities for employment.

weapon. The defendant, who came within that class, was handed a weapon at a party to use against some belligerent intruders. The trial judge refused to give an instruction on self-defense. On review, the Court held that the statutory right to self-defense was not overcome by the statute prohibiting the possession of a concealable weapon. The Court then concluded that the use of such a weapon not theretofore possessed by the defendant for the purpose of self-defense is neither a crime nor an unlawful purpose. People v. King, 23 Crim. Law Report 2525 (September 20, 1978).

Recognizing the duty of this Court to construe Ohio statutes to be constitutional where logically possible, see Washington Court House v. McStows (1976), 456 Ohio St. 2d 228, 230, R.C. 1.47 and R.C. 1.49, we believe that the affirmative defense of self-defense must be available to the defendant in the case at bar.

We therefore hold that the prohibitions of R.C. 2923.21 do not restrict the right of an individual under disability from acting in self-defense, when he did not knowingly acquire, have, carry or use a firearm previously.

Accordingly, the judgment of the trial court is reversed and remanded for a factual determination of self-defense.

Judgment reversed
and cause remanded.

PARRINO, P.J. and STILLMAN, J., concur.